

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 01

MILWAUKEE COUNTY

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MARK VASQUEZ,

PETITIONER-PLAINTIFF,

MILWAUKEE POLICE ASSOCIATION,

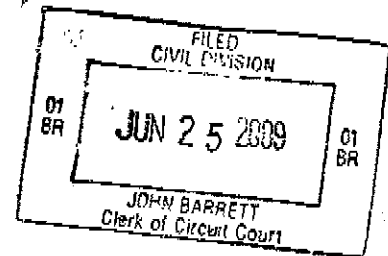
Case No.: 08-CV-6517

INTERVENOR-PLAINTIFF,

VS.

BOARD OF FIRE AND POLICE COMMISSIONERS  
OF THE CITY OF MILWAUKEE,

RESPONDENT-DEFENDANT.



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**FINAL DECISION AND ORDER**

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**INTRODUCTION**

Petitioner Mark Vasquez ("Petitioner" or "Vasquez") and Intervenor Plaintiff, Milwaukee Police Association, appeal the April 3, 2008, decision of the Board of Fire and Police Commission ("Board") in which the Board sustained Vasquez's discharge for violating the City of Milwaukee's residency rule. For the reasons stated below, this Court **AFFIRMS** the decision of the Board.

**BACKGROUND**

Petitioner Vasquez was employed as a police officer for the City of Milwaukee for twenty-one years. At the time of his discharge, he was employed as an I.D. Technician. Prior to mid-2005, Vasquez owned a house in Milwaukee and lived there with his wife and children. In 2004, Vasquez and his wife made a "family decision" to build a house in Mukwonago, Wisconsin, where his wife and children would reside. The Mukwonago property is a five

bedroom, 3 ½ bathroom single family residence with a three car garage. Vasquez rents an apartment in Milwaukee. The Milwaukee apartment is a two bedroom, one bathroom upper portion of a duplex.

On July 27, 2005, the Milwaukee Police Department received an anonymous complaint regarding Vasquez's residency status. The Department investigated the anonymous complaint and conducted surveillance on Vasquez. On June 5, 2007, the Chief of the Milwaukee Police Department discharged Vasquez for violating the City of Milwaukee's residency rule. On April 3, 2008, the Board sustained the discharge.

At the Board's hearing, Vasquez testified that he keeps essentially all of his clothing and personal property at the Milwaukee apartment, but that when he retires he will probably join his wife and family and reside in Mukwonago if that is where they still reside. Family gatherings are held at the Mukwonago property, not the Milwaukee apartment. Vasquez testified that he votes in Milwaukee, receives some of his mail in Milwaukee, obtained a fishing license using the Milwaukee address, and has his personal automobile registered and insured using the Milwaukee apartment's address. Vasquez kept a logbook listing the time he spent at the Milwaukee apartment during July and August 2005. The logbook showed that Vasquez went to the Mukwonago residence after work to spend time with his wife and children, and returned to the Milwaukee address to sleep on work nights. On his final day of the work week, Vasquez would go to Mukwonago after work until the night after his next work day. The Board found that Vasquez spent essentially all of his free time with his family in Mukwonago or elsewhere outside of Milwaukee. Vasquez testified that he believes his current living situation constitutes residency and that it was not his intention to hide his family's residence in Mukwonago and that he gave Captain Diana Rowe the phone number of his wife's home in Mukwonago for

emergencies. Vasquez sought advice from his union president on how to handle his living situation. Vasquez did not contact the Milwaukee Police Department, the Fire and Police Commission or the Department of Employee Relations for guidance in order to insure compliance.

Sergeant Peter Mulock was the lead investigator in this case. He and the other investigators reviewed MPD personnel records and public real estate tax records regarding the two properties, conducted surveillance and interviewed neighbors at both properties. Vasquez was also interviewed regarding the situation.

At the close of the hearing, the Board deliberated and issued a unanimous decision that Vasquez had violated MPD Rule 4, Section 2/040.00 by failing to reside in Milwaukee. After a hearing regarding disposition, the Board decided unanimously that the only appropriate disposition was for Vasquez to be dismissed from the Milwaukee Police Department. This case is now before the Court on both statutory and certiorari appeal.

### **STANDARD OF REVIEW**

Under statutory review, in accordance with Wisconsin Statute §62.50(21), the Court will determine: "under the evidence is there just cause, as described in sub. 17(b), to sustain the charges against the accused?"

Wisconsin Statute §62.50 states:

(17) Decision, Standard to Apply ...

(b) No police officer may be suspended, reduced in rank, suspended and reduced in rank, or discharged by the board under sub. (11), (13) or (19), or under par. (a), based on charges filed by the board, members of the board, an aggrieved person or the chief under sub. (11), (13) or (19), or under par. (a), unless the board determines whether there is just cause, as described in this paragraph, to sustain the charges. In making its determination, the board shall apply the following standards, to the extent applicable:

1. Whether the subordinate could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.
2. Whether the rule or order that the subordinate allegedly violated is reasonable.
3. Whether the chief, before filing the charge against the subordinate, made a reasonable effort to discover whether the subordinate did in fact violate a rule or order.
4. Whether the effort described under subd. 3. was fair and objective.
5. Whether the chief discovered substantial evidence that the subordinate violated the rule or order as described in the charges filed against the subordinate.
6. Whether the chief is applying the rule or order fairly and without discrimination against the subordinate.
7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the subordinate's record of service with the chief's department.

A circuit court determines whether there is just cause, based on the evidence, to support an order of the board of fire and police commissioners. *Gentilli v. Board of Fire & Police Comm'rs of the City of Madison*, 2004 WI 60, ¶ 35, 272 Wis.2d 1, 680 N.W.2d 335.

The Board's decision must be reasonable, based on the evidence that the Board found to be credible. *Younglove v. City of Oak Creek Fire & Police Commission*, 218 Wis.2d 133, 139, 579 N.W.2d 294 (Ct. App. 1998). The circuit court is not permitted to take evidence. The test is whether taking into account all the evidence in the record, "reasonable minds could arrive at the same conclusion as the agency." *Kitten v. State Dep't of Workforce Dev.*, 2002 WI 54, ¶ 5, 252 Wis.2d 561, 569, 644 N.W.2d 649. When "the evidence allows more than a single reasonable inference, a question of fact is presented, and the Commission's findings, if supported by any credible evidence, are conclusive upon the court." *Universal Foundry Co. v. DILHR*, 86 Wis. 2d 582, 589, 273 N.W.2d 324 (1979).

The Board's factual findings must be upheld if they are supported by credible and substantial evidence in the record. *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 54, 330

N.W.2d 169 (1983). "Reviewing tribunals defer to credibility determinations made by those who hear and see the witnesses." 218 Wis.2d at 139.

Review by certiorari is limited to whether the commission kept within its jurisdiction and whether the commission proceeded on a correct theory of law. *See State ex. rel. Kaczowski v. Fire & Police Comm.*, 33 Wis.2d 488, 501-02, 148 N.W.2d 547 (1967). On certiorari review, there is a presumption that the commission acted according to the law and the decision reached was correct. *See State ex. rel. Ruthenberg v. Annuity & Pension Bd.*, 89 Wis.2d 463, 473, 278 N.W.2d 835 (1979). The weight and credibility of the evidence cannot be assessed on certiorari review. *Id.*

### ANALYSIS

The petitioner alleges that the Board's decision must be reversed for the following reasons: (1) the defendant failed to prove by a preponderance of the evidence that there was just cause to sustain the charge; (2) the rule in question is unreasonable in that the subordinate could not reasonably be expected to understand the consequences of his or her conduct, so as to satisfy the "just cause" standards of Wis. Stat. § 62.50(17); (3) the Board proceeded on an incorrect theory of law when defining the term "residence," when determining what constituted a "bona fide residence", and (4) by determining that discharge was the only course of action available. The petitioner further alleges that there was insufficient evidence to support the Board's decision, and therefore the decision was arbitrary and unreasonable and must be reversed. The Court will address each allegation separately.

#### **I. Just Cause to Sustain the Charge.**

As noted above, on review, the Court is limited to finding whether there was just cause, based on sufficient evidence, to uphold the Board's finding. As set out below, the Court is

convinced that the record contains ample evidence to support the Board's finding that the City established by a preponderance of the evidence that there was just cause to sustain the charge.

## II. Rule in Question

Residency requirements similar to the rule in question, which requires Milwaukee Police Officers to live in the City of Milwaukee, have been upheld as constitutionally valid by both the United States Supreme Court as well as Wisconsin courts. *See McCarthy v. Philadelphia Civil Serv. Comm'n*, 424 U.S. 645 (1976), *Eastman v. City of Madison*, 117 Wis.2d 106, 342 N.W.2d 764 (Ct. App. 1983) (overruled on other grounds).

Petitioner alleges that the rule in question is unreasonable in that the subordinate could not reasonably be expected to understand the consequences of his or her conduct. However, Vasquez testified at the February 13, 2008, hearing that he in fact was aware of the residency requirement and that he was also aware that he could be discharged for violating it. Based on the petitioner's own testimony, therefore, he could reasonably be expected to understand the consequences of his conduct. Further, Vasquez's testimony shows that he was in fact aware of the consequences of his conduct.

Contrary to Petitioner's assertion, the Board's reference to Vasquez's failure to contact the Milwaukee Police Department, the Fire and Police Commission or the Department of Employee Relations to insure his compliance with the residency requirements, was not a newly implement requirement. Instead, the Board likely pointed this out as evidence of its belief that Vasquez intended to hide his dual residence from his supervisors. Vasquez was not required to tell his supervisor of his family's move; however, the City policy that all City employees are be informed of, recommends that employees "with questions about the City residency requirement should contact their immediate supervisor or the Department of Employee Relations." Feb.

Tran., Ex. 4. The Court is not convinced that the Board's reference to this matter is a new requirement that Vasquez was expected to know and failed to comply with. Furthermore, contrary to Petitioner's assertion, supplying his supervisor with his wife's phone number in Mukwonago did not result in reporting the situation to his supervisor and his supervisor's silence should not have been taken by the petitioner as compliance with the residency requirement. The phone number likely had a Mukwonago area code; however, many Milwaukee residents likely have cell phones with various area codes.

The Court is convinced that there is sufficient evidence to support the Board's finding that the rule in question is reasonable and that the petitioner could reasonably have been expected to understand the consequences of his conduct.

### **III. Definition of "residence"**

Upon review of the record, the Court does not agree with Petitioner that the Board is attempting to regulate where Vasquez spends his free time. The City conducted an investigation, including surveillance of Vasquez, interviews of neighbors at both residences, review of tax records of both residences, and obtained mortgage documents. Vasquez himself was also interviewed and given the opportunity to voice his side of the story. Vasquez's logbook was also presented to the Board. All of the above evidence was presented, and the Board was convinced that the petitioner was maintaining a dual residence in violation of Rule 4, Section 2/040.00.

The Black Law Dictionary definition, referenced by the Board, is in line with the City's definition of residence. The City defines residence as "the actual living quarters which must be maintained within the city by an employee." Milwaukee City Charter §5-02-2. The record is clear that the Board decided the case based on the City's definition of residence and the criteria endorsed by the City to determine residency. For example, the Board considered "where a

person spends leisure time, maintains valuable personal possessions and engages in the most important aspects of one's life." Decision, at 9. Criteria set forth in the City of Milwaukee City Service Commission Personnel Department's Personnel Policy #87-4 likewise consider where the employee keeps tangible personal property and where the employee spends his time. The Board found that Vasquez's time spent in Milwaukee did not rise to the level of residency, based on numerous factors, in sum, that "every other important aspect of his life centers around his home and family in Mukwonago . . . where he spent the greatest portion of his waking hours when not at work." *Id.* The Board properly applied the criteria for residence set forth by the City.

The Board further determined that the petitioner's testimony on this issue was not credible and that his actions were "not a good faith effort to maintain his bona fide residence in the City of Milwaukee as required." *Id.* at 10. The Court is not permitted to make its own credibility determination and defers to the Board on this matter. The Court finds that the Board's finding was supported by substantial evidence, and the Court affirms the Board's finding.

#### IV. Discharge

Upon review of the statutes, the Court concludes that the Board has rule-making authority, under which it has the power to determine the appropriate punishment for certain conduct. "The legislature may either expressly or implicitly authorize an agency, such as the Board, to promulgate a rule. An administrative agency has only those powers as are expressly conferred or necessarily implied from the statutory provisions under which it operates. *State ex rel. Castaneda v. Welch*, 303 Wis.2d 570, 586, 735 N.W.2d 131 (2007) (citations omitted). Turning next to the statute, Wis. Stat. sec. 62.50(3)(a) provides that the "board may prescribe rules for the



government of the members of each department and may delegate its rule-making authority to the chief of each department."

The City's policy of discharge upon violation of its residency requirements is not in violation of the just cause standards. Rather, the Board was granted rule-making authority by the legislature, and based on the record, the Board properly applied the just cause standards of Wis. Stat. sec. 62.50(17)(b) in determining whether to sustain the charge. Furthermore, the petitioner was given an opportunity to tell his side of the story and afforded a full hearing on the matter, during which all of the just cause factors were addressed.

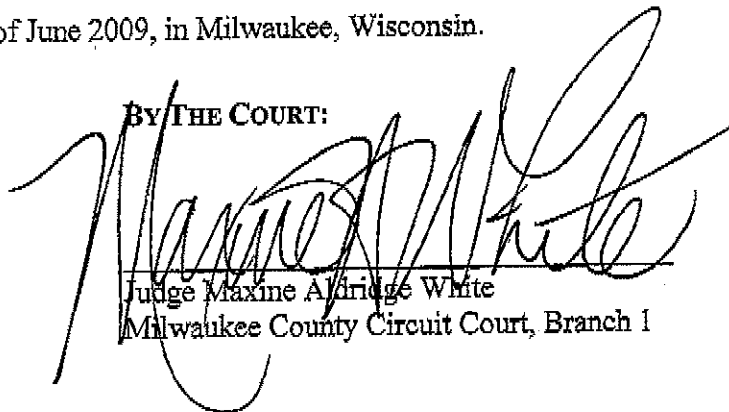
### CONCLUSION AND ORDER

Based on the record and briefs submitted by both parties, this court finds that the record contains ample evidence to support the Board's findings under both statutory appeal and certiorari review.

Accordingly, **IT IS HEREBY ORDERED** that the State of Wisconsin Division of Hearings and Appeal decision is **AFFIRMED**.

Dated this 25<sup>th</sup> day of June 2009, in Milwaukee, Wisconsin.

BY THE COURT:

A large, stylized handwritten signature in black ink, appearing to read 'Maxine Albridge White', is written over a horizontal line.

Judge Maxine Albridge White  
Milwaukee County Circuit Court, Branch 1